QUESTION #1

In re WPE Property Development, Inc.

Examinees' law firm represents WPE Property Development, Inc., a developer of low-income housing properties in Franklin. WPE contracts with Trident Management Group to manage many of its properties in compliance with Internal Revenue Code provisions to ensure tax-exempt status. One of these properties has now lost its tax-exempt status as the result of Trident's mismanagement. WPE and Trident have a long-term business relationship that is valuable to both parties. Thus, while WPE appears to have a strong breach-of-contract claim against Trident (for tax liabilities and penalties resulting from Trident's failure to maintain the tax-exempt status), the client, WPE's CEO, is reluctant to file suit against Trident. He hopes that a settlement can resolve the matter short of litigation and thereby also avoid negative publicity for the housing project. However, despite many assurances from Trident's counsel that Trident is willing to reach a settlement and make WPE whole for its losses, no final agreement has been reached and the statute of limitations on a claim against Trident will run in just 15 days. The senior partner must advise WPE's CEO of the legal consequences of not filing the complaint against Trident before the deadline. Examinees are asked to draft a letter to WPE's CEO for the senior partner's signature analyzing the potential legal consequences to WPE if it decides not to file its complaint against Trident and any possible theories under which WPE could recover against Trident after the limitations period has run. The File consists of the task memorandum from the senior partner, a memo to the file summarizing WPE's concerns, and several pages of correspondence between counsel for WPE and Trident discussing the proposed settlement of the breach-of-contract claim. The Library contains three cases on the statute-of-limitations issue.

MINNESOTA BAR EXAMINATION
FEBRUARY 2012
REPRESENTATIVE GOOD ANSWER
QUESTION 1

Rawson Hughes & Conrad
22 Main Street
Springfield, Franklin 33755

WPE Property Development, Inc.
ATTN: Juan Moreno, CEO
6002 Circle Drive
Springfield, Franklin 33755

February 28, 2012

RE: Dispute with Trident Management Group

Dear Mr. Moreno,

Thank you for entrusting us with your legal business regarding this dispute. As I understand it, your goals in this matter are to continue negotiations and avoid a lawsuit against Trident Management. It seems both parties wish to maintain the longstanding business relationship you have mutually enjoyed, and avoid negative publicity for either company. Your chief obstacle is now the statute of limitations for this type of legal action, which expires in approximately 15 days. In other words, if you do not sue or settle within 15 days, you may be denied the ability to sue in the future. However, there are three main legal options which may help us get around that statute of limitations, especially given Trident's behavior during settlement negotiations over the last year: an agreement to toll the statute of limitations, a motion to excuse the statute of limitations by equitable estoppel and a motion to excuse the statute of limitations by promissory estoppel.

Agreement to Toll Statute
We have sent an agreement to "toll" the statute of limitations to Trident's legal counsel. Essentially, this written agreement "stops the clock" for six months while we continue negotiations. Such agreements are well-settled as acceptable and valid to the Franklin courts when mutually agreed upon, and in principle, Trident does not seem to disagree with this step. However, they have not signed the draft agreement we sent to them on January 10th.

This agreement allows you the right to sue after the statute of limitations has expired, and in our case, would buy you another six months to finish settlement negotiations. The problem is that Trident has not yet returned the agreement to toll, and we are coming up very quickly against the deadline. This is the easiest method of continuing negotiations and also gives Trident additional time to hammer out their internal details.

It would be wise for both parties to get this agreement in place as soon as possible so you can continue settlement talks.

Equitable Estoppel

Equitable estoppel is a legal theory that allows a plaintiff to sue after the statute of limitations has run, because they have made the decision not to sue based on something a defendant has done or said. The Ford test (as applied in Henley v. Yunker) requires three elements to support a claim of equitable estoppel and sue after a statute of limitations has expired. They are as follows:

1. Defendant has done or said something that was intended to induce the plaintiff to believe in the existence of certain facts and to act upon that belief. Here, Trident responded a number of times to our inquiries and letters, and each time assured us that settlement negotiations were well underway, a settlement would take place, and asked us not to file suit. There were no less than five instances of this type of request in our case file, and based on this information, we did not, file suit upon your behalf. Because we believed Trident was actively working on a settlement and had no reason to believe otherwise, we acted on that belief by not suing.

2. Plaintiff, as a result of that influence, has actually acted to his injury, which he otherwise would not have done. Due to the ongoing correspondence as stated above, we repeatedly requested that Trident's counsel reply or counter a settlement offer, or even return the agreement to toll, as stated above. In doing so, we have expended time and come to this point, where we are 15 days away from potentially losing the right to sue on this matter. Because we waited so long (and only did so as a result of Trident's reassurances in the negotiations process), we are in a worse position than we would have been had we actually commenced suit. We would not have waited to sue, and in fact notified them of our intent to file suit on numerous occasions, and did not do so based solely upon their communications with us.

3. Plaintiff has exercised due diligence, inasmuch as equitable estoppel is not available to a person who conducts himself with a careless indifference or ignores highly suspicious circumstances which should warn of danger or loss. Due diligence means that we have not taken an inordinate amount of time or left the file to become stale – we have actively worked on this case. Here, our file and diary reflect no less than six letters, three meetings, and five to seven emails in the written file. Each of these reflect notations to telephone conversations and other communications over the last eleven months. There is a short gap between the end of July and the beginning of October, but that is not a significant enough amount of time to warrant defeat of this particular requirement.

Further, in Merchants' Mutual v. Budd, the Franklin court said "one cannot justly or equitably lull his adversary into a false sense of security and thereby cause him or her to subject a claim to the bar of the statute, and then be permitted to plead the very delay caused by such conduct as a defense to the action when brought." The Court agrees that the sort of time-delay tactics used by Trident in this case are the type which can permit equitable estoppel relief. Our likelihood of success on this theory is good, given the facts as stated above, provided we file a motion very quickly.

Promissory Estoppel

The third legal remedy available to you is promissory estoppel. The main difference between promissory estoppel and equitable estoppel as outlined above is that the plaintiff relies on the defendant's promises, not their actions or facts as offered. The controlling case in Franklin on this matter is DeSonto v. Pendent Corp. Pendant defines promissory estoppel as centering on a "'promise' made by a defendant under circumstances where considerations of fairness and equity will relieve the promisee from any adverse effects of his or her reliance on the promise."

The Pendant court used the test found in the Chester's Drive-In test to prove promissory estoppel, and it consists of four elements:

1) <u>There is a promise which defendant should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the plaintiff</u>. Here, the defendant made multiple promises to return calls, settle, and finish the case. It is reasonable for them to expect that their promise would be one which we would rely upon in order to not file suit. Not filing suit is as definite an action as actually filing suit, and we relied on this promise, which is exactly what Trident expected us to do.

2) <u>The promise must actually induce such action or forbearance</u>. After repeated requests not to file suit, we continued to honor that request. Therefore, their promises actually induced us not to act upon the multiple requests not to file suit. As of right now we have not filed suit, and therefore this element is satisfied.

3) <u>Action or forbearance must be REASONABLE</u>. Each time we were requested to forego a suit, it was due to an ongoing negotiation or request for additional time, and we maintained diligent contact with Trident's counsel. It is reasonable to use the statute of limitations to continue settlement talks, and it is also reasonable to assume that active work on the file is a reasonable course of action when we believed settlement was imminent. Further, we acted on your request in July to continue settlement talks, and at no time did we feel that any request made by Trident was unreasonable.

4) <u>Injustice can be avoided only by enforcement of the promise</u>. Here, your company stands to lose a significant amount of money and have negative publicity. These are both injurious results of the statute of limitations running out due to Trident's delays and deferrals. As such, if we can enforce the promise to settle or at least to toll the statute, we can relieve your potential liability. Right now, it seems there is no other way of forcing them into action other than hauling them into court in some way.

Based on the above, we believe an outcome on a motion of promissory estoppel would be likely to succeed. Both parties have indicated that they wish to settle this matter without suit, in order to avoid negative publicity, and we are amendable to continuing settlement talks, as long as they remain productive and ultimately fruitful. We believe we have a good chance of settlement if we can avoid the statute of limitations.

Please advise us on how you would like to proceed, given our recommendations.

Sincerely,

Thomas Perkins
Managing Partner, Tax Group
Rawson Huges & Conrad

QUESTION #2

The owner of a rare antique tapestry worth more than $1 million is a citizen of State A. The owner contacted a restorer, a citizen of State B, to restore the tapestry for $100,000. The owner and the restorer met in State A and negotiated a contract, but the final documents, prepared by the parties' respective attorneys, were drafted and signed in State B. The contract has a forum-selection clause that specifies that any litigation arising out of or relating to the contract must be commenced in State B.

The restorer repaired the tapestry in State B and then informed the owner that the restoration was complete. The owner picked up the tapestry and paid the restorer $100,000. Subsequently, the owner discovered that the restorer had done hardly any work on the tapestry.

Despite the forum-selection clause in the contract, the owner filed suit against the restorer in a state court in State A, claiming breach of contract. The owner's suit sought rescission of the contract and a return of the full contract price—$100,000.

The laws of State A and State B are different on two relevant points. First, State A courts do not enforce forum-selection clauses that would oust the jurisdiction of State A courts, regarding such clauses as against public policy; State B courts always enforce forum-selection clauses. Second, State A would allow contract rescission on these facts; State B would not allow rescission but would allow recovery of damages.

Under the conflict-of-laws rules of both State A and State B, a state court would apply its own law to resolve both the forum-selection clause issue and the rescission issue.

After the owner filed suit in State A court, the restorer removed the case to the United States District Court for the District of State A and then moved for a change of venue to the United States District Court for the District of State B, citing the contractual forum-selection clause in support of the motion. (There is only one United States District Court in each state.) The owner moved for remand on the ground that the federal court did not have removal jurisdiction over the action. Alternatively, the owner argued against the motion to transfer on the basis that the forum-selection clause was invalid under State A law.

1. Does the federal court in State A have removal jurisdiction over the case? Explain.

2. Should the change-of-venue motion, seeking transfer of the case to the federal court in State B, be granted? Explain.

3. Would a change of venue affect the law to be applied in resolving the rescission issue? Explain.

MINNESOTA BAR EXAMINATION
FEBRUARY 2012
REPRESENTATIVE GOOD ANSWER
QUESTION 2

1) Does the federal court in State A have removal jurisdiction over the case?

A defendant has a right to remove any case in state court to the same federal court upon a showing that the federal court would have been proper, this must be completed within 20 days of the time when it becomes eligible for removal OR within one year of the case being filed in court. In this case, it appears that the case was recently filed in state court so the defendant should have the power to bring the case in federal court if the case could have originally be brought in federal court. I am assuming that the requirement of the state long arm statute has been fulfilled and will ignore that in my further analysis.

Federal courts are courts of limited jurisdiction and therefore must comply with a number of statute and constitutional requirements. For a case to be brought in federal court there needs to be personal jurisdiction and subject matter jurisdiction. Personal jurisdiction refers to the federal courts ability to have jurisdiction over the parties. Subject matter jurisdiction is the courts ability to hear a certain type of case, federal courts are allowed to hear cases involving claims that arise under federal law OR that are based upon complete diversity of the parties and are over 75,000 exclusive of costs, interests and fees. Personal jurisdiction needs to satisfy the constitution and a long arm statute.

Personal jurisdiction is the authority of the court to hold the case. In this case, it can be assumed as stated above that the long arm statute has been satisfied, then we must look towards the constitutional requirements. The constitution requires both minimum contact and fairness. Minimum contact is established through the defendant availing himself of the forum and the foreseeability of being brought into litigation in this forum. The Defendant availed himself of the State A forum by agreeing to take the business of someone within State A. It was foreseeable that he would be brought into State A based upon his transactions with residents of State A. The restorer met the person in State A. There is sufficient contacts here to establish the defendant is liable to sue in State A.

Fairness is 1) the conscious and systematic contacts or the relation to this claim, 2) convince of the parties, and 3) the states interest. In this case, there were probably not systematic and conscious contacts necessary to establish a full presence in the state upon which he would be completely liable to any suit; however there was contact with respect to this case. The convenience of the parties is negligible at best; the cost to travel to litigate is not a significant interest. The interest of the states are both the fact that their citizens are being injured by out of state citizens in a deal that took place across two states. The rug is in State A, the work was done in State B, the defendants traveled across the boards attempt to make this case go.

Subject matter jurisdiction for federal courts is either the claim arises under a federal law (well pled complaint) OR the complete diversity of the parties and OVER 75,000 is the amount in controversy. To first determine where the parties live we must determine the domicile. This case does not involve any apparent issue of federal law; this issue would have to be factually clear. The issue of diversity is determined based upon the domicile of the parties at the time the claim is filed. The domicile is determined by their presence and their intent to remain indefinitely. As mentioned before, the long arm of the state must also be fulfilled. Citizen of State A can be assumed to be living in State A and intending to remain there. Citizen of State B must live in State B and intend to remain there indefinitely. Assuming these two are diverse, this element is satisfied. Second, the seventy-five thousand dollars is satisfied in this case because the Plaintiff has demanded rescission of the contract which is valued at $100,000. There is diversity jurisdiction which allows for this claim to be brought in federal court.

Therefore, the defendant is allowed to remove the cases to the federal court, the same district as it was originally brought, i.e., the only one in the state, assuming it was filed on time.

2) Should the change of venue motion, seeking transfer of the state to the federal court in State B, be granted?

A change of venue motion should not be granted in this case. The plaintiff has a right to being the case any forum upon which he chooses assuming there is jurisdiction. The court should look at a number of factors including the location of the thing at issue, the location of the witnesses, the states interests, and delay. In this case, there is not enough of an interest to transfer the case from State B to State A. State A courts must apply the substantive law of the jurisdiction upon which it sits and in this case the law should be the law of State B. One issue is whether this is substantive or procedural and in this case it appears to be more substantive again weighing in favor of leaving it here. For purposes of judicial efficiency if they are going to be compelled to apply the laws of State A, they should keep the case to avoid applying another jurisdiction's laws which while allowed is burdensome on the judicial system. There were substantial contacts in both forums, each defendant lives in one state, there are no witnesses to speak of, the contract was signed in one state and negotiated in the other. Both states have an interest and in this case the court should defer to the Plaintiff's choice.

3) Would a change of venue affect the law being applied in resolving the rescission issue?

A change of venue on a properly filed case would not affect the law being applied in this case. In this circumstance, the defendant was properly brought to court under the laws of State A. If the court had found the jurisdiction was improper, i.e., no personal jurisdiction, subject matter, except the court would have the option of dismissing the case or transferring the case and the law of the proper state would be applied.

In this case, its law of the jurisdiction upon which the case originally was brought should be applied.

QUESTION #3

University has been sued in federal court by a former employee, Paula, alleging that Sam, her immediate superior and manager in University's Finance Dept. (Finance Dept.), sexually harassed her.

The complaint alleges that from January 13, 2008, when Paula started to work for the Finance Dept., until January 31, 2010, when this lawsuit was filed, Sam repeatedly told Paula to wear tighter clothes, wear shorter skirts and to "loosen up." She further alleged that on many occasions when he reviewed documents with her, he came closer to her physically than necessary, touching her on various parts of her body including her back, and brushing against her breasts as he handed papers to her. When she told him that he should keep his distance and she was not interested in his advice on how to dress or being touched by him, he told her this was not the kind of "team work" that got employees ahead in the Finance Dept.

Shortly after the complaint was filed, University fired Sam. Sam then visited his psychiatrist and told Psychiatrist that he (Sam) had stepped over the line with one of his employees, Paula. Sam told Psychiatrist that he thought he could get away with it because he knew Paula wanted to advance in the Finance Dept.

A few weeks later, Psychiatrist attended a party attended by current and former university employees, and met Paula, also a guest at the party. In talking with Paula, Psychiatrist realized the connection between Paula and his patient, Sam. After having too much to drink, Psychiatrist told Paula about Sam's statement that Sam had stepped over the line with her. Psychiatrist said that Sam had said that he (Sam) thought he could get away with it because Paula wanted to advance in the department.

Sam has since left the country and is now living permanently in Argentina.

The matter is going to trial and Paula's lawyer indicates that he will call the following witnesses:

1. Paula, to testify regarding the statements and actions of Sam, and her statements in response.
2. Fran, to testify that she was hired by Sam to work in the Finance Dept. on June 27, 2009, but remained in the department for only three months. She asked to transfer to a different department because while she worked with him, Sam kept telling her to wear more revealing clothing and kept touching her in inappropriate ways.

3. Sandra, to testify that when she worked in the Finance Dept. in 2002, Sam repeatedly asked her to go out with him. She refused, and when he persisted, she requested and received a transfer to another department.

4. Psychiatrist, to testify regarding the statements he made to Paula at the party.

You are the law clerk to the federal judge before whom the matter is pending. The judge asks you to do the following:

a. anticipate the evidentiary issues that are likely to arise in trial;

b. analyze each issue thoroughly; and

c. explain how you would resolve them and why.

MINNESOTA BAR EXAMINATION
FEBRUARY 2012
REPRESENTATIVE GOOD ANSWER
QUESTION 3

TO: Judge

FROM: Law Clerk

RE: Paula v. University

Your Honor,

The plaintiff in this case intends to call four witnesses. Below is my analysis of the evidentiary issues that I believe are likely to arise in trial.

1. Paula

It is anticipated that Paula (P) will testify regarding the statements and actions of Sam (S). The University (U) will probably object to this testimony as hearsay. Hearsay is an out of court statement offered to prove the truth of the matter asserted. Actions may qualify as a "statement," if they were intended as an assertion. The federal rules of evidence define certain conduct, which would otherwise fall within the definition of hearsay, as "non-hearsay." This includes an admission by a party opponent and, in certain circumstances, prior statements of a witness. These circumstances include (1) the statement was made under oath and is inconsistent with trial/hearing testimony, (2) the statement was consistent and is offered to rebut an allegation of fabrication/motive to lie, when the prior statement was made before the potential motive existed, and (3) the prior statement was an identification made after perceiving a person (i.e. a police show-up). Other statements that still qualify as hearsay may be admissible, if they fall within certain exceptions. Some of these exceptions are available regardless of whether the declarant is available or not (e.g. present sense impression, excited utterance, then existing physical/mental state, statements made in the course of seeking treatment/diagnosis, past recollections recorded, and business records), while other exceptions are only available if the declarant is unavailable (e.g. prior testimony in sufficiently related matter, statement against interest, dying declaration, statement regarding family history, and statement against party procuring witness' unavailability). Here, S's statements (including his actions) appear not be offered to prove the truth of the matter asserted. For example, P will not be offering S's statement that P's refusal to conform to S's attire/contact requests was not the kind of team work that got employees ahead in the Finance Dept. to prove that it in fact took that kind of behavior to get ahead – she will be offering it to prove that S harassed her. Therefore, it appears the hearsay objection should be overruled. It is also anticipated that P will testify regarding her statements in response to S. Similar to the above analysis. P will probably not offer her statement of disinterest to prove she really was not interested in S's advice on how to dress or in being touched by him – she will be offering it to prove what she told S. Again, this appears not to be hearsay and this objection should be overruled.

2. Fran

Generally, evidence of prior bad acts is inadmissible to prove that a defendant acted in conformity with his or her character. This is a civil action, and I am not sure if the same rules apply. However, in a criminal case, there are exceptions to the rule regarding prior bad acts. First, a defendant may introduce evidence of his or her good character, if the character trait is pertinent; this may only be done with reputation/opinion testimony. If the defendant puts his or her character at issue by introducing such evidence of good character, the defense may rebut this with EITHER contrary reputation evidence or evidence of specific bad acts. No extrinsic evidence of these bad acts (except a conviction record) may be admitted. Even if the defendant does not put his or her character at issue, evidence of prior bad acts may be admissible for a purpose other than to prove that the defendant acted in conformity with his or her character. These other purposes include: to prove motive, intent, absence of mistake, identity (i.e. the crime is a signature), or a common scheme or plan. Here, the testimony of Fran is likely admissible to prove S's intent, absence of mistake, and a common scheme or plan. Like P, Fran was hired by S to work in his department, S allegedly told her to wear tighter clothes, and S allegedly touched her in inappropriate ways. These incidents occurred in the same environment and during the same timeframe. The jury should be instructed regarding the limited purpose of this evidence. There are further exceptions to the inadmissibility of evidence regarding prior bad acts (as it goes to credibility, not as substantive evidence) but these are not applicable here (they relate to prior convictions, within the last 10 years).

3. Sandra

Sandra's testimony may qualify for an exception similar to that of Fran's. However, I do not think the incident between S and Sandra is sufficiently related. This situation was approximately 6 years prior to when S's conduct with P began, and S's alleged behavior was marked differently in the situation with Sandra (S asked Sandra out – he did not touch her or make sexual requests regarding her work attire). However, S did repeatedly ask Sandra out, and Sandra did work in the finance department, so S may have been her superior/manager, so you may find the incidents sufficiently related.

4. Psychiatrist

Although the psychiatrist made the statements to P himself, his statements contain potential hearsay – i.e. S's statements. S's statement may be defined as non-hearsay, as an admission by a party opponent, because S was an employee of the U and the U is a party. S's statements were made after he was fired, but concerned his employment with the U. Therefore, I think it should qualify as an admission of a party opponent. If not, an exception may apply. S is now unavailable, as he is living in Argentina, beyond the court's subpoena. If the declarant is unavailable, a statement against interest is admissible. This statement appears to be against S's interest, as it admits his culpability. Also, whether or not S was available, the statements may be admissible as statements made in the course of seeking treatment, if the psychiatrist was treating S.

However, certain communications are privileged. A common privilege is between a psychiatrist and a patient. This privilege appears to cover S's statements. Although the psychiatrist breached the confidential nature of this communication, it was not his

privilege to waive. Thus, S is still protected by this privilege. I would not allow the psychiatrist to testify regarding S's statement, which he shared with P.

QUESTION #4

Blackacre, which is immediately to the west of Whiteacre, is bounded on its west by a state highway. Whiteacre is bounded on the east by a county road. Both roads connect to a four-lane highway.

Twenty years ago, Tom, who then owned Blackacre, sold to Sue, who then owned Whiteacre, an easement over a private gravel road that crossed Blackacre. This easement allowed Sue significantly better access to the four-lane highway from Whiteacre than she had had using only the county road adjacent to Whiteacre. The easement was promptly and properly recorded.

After acquiring this easement, Sue discontinued using the county road to the east of Whiteacre and used the private gravel road crossing Blackacre to travel between Whiteacre and the four-lane highway. Sue used the private gravel road across Blackacre for that purpose almost every day for the next 18 years.

Fifteen years ago, Sue purchased Blackacre from Tom. The deed from Tom to Sue was promptly and properly recorded.

Two years ago, Sue sold Whiteacre to Dan. The deed from Sue to Dan, which was promptly and properly recorded, did not mention the private gravel road crossing Blackacre, although Dan was aware that Sue had used the road to more easily access the four-lane highway.

Following the purchase of Whiteacre, Dan obtained a construction loan from Bank secured by a mortgage on Whiteacre. This mortgage was promptly and properly recorded. The loan commitment, in the amount of $1,500,000, which was reflected in the mortgage, obligated Bank to loan Dan $300,000 immediately. It further obligated Bank to loan Dan an additional $500,000 in 180 days and $700,000 in 280 days.

After obtaining the second loan installment from Bank, Dan realized that he would need additional funds and borrowed $400,000 from Finance Company. This loan was also secured by a mortgage on Whiteacre. Upon Dan's signing the note and mortgage, Finance Company immediately remitted the $400,000 to Dan and promptly and properly recorded its mortgage.

Thereafter, Bank advanced the final $700,000 loan installment to Dan.

Recently, Dan defaulted on the loans from both Bank and Finance Company. At the time of these defaults, Dan owed $1,500,000 to Bank and $400,000 to Finance Company.

At a proper foreclosure sale by Bank, Whiteacre was sold for $1,500,000 net of sale expenses.

1. Immediately before Sue sold Whiteacre to Dan, did Sue have an easement over Blackacre? Explain.

2. Immediately after Sue sold Whiteacre to Dan, did Dan have an easement over Blackacre? Explain.

3. How should the proceeds from the sale of Whiteacre be distributed between Bank and Finance Company? Explain.

MINNESOTA BAR EXAMINATION
FEBRUARY 2012
REPRESENTATIVE GOOD ANSWER
QUESTION 4

1. Sue's Easement

Sue did not have an easement over Blackacre (B) because she owned both properties. Sue may claim she had an express easement over Blackacre. An express easement must be in writing to satisfy the statute of frauds, must identify the servient land, and must state the scope of the easement. Here, the facts say the easement was properly recorded. B was the servient land and Whiteacre (W) was the dominant land. This was an appurtenant easement. For an appurtenant easement to run with the servient land, a subsequent purchaser must have notice of the easement (easements always automatically run with the dominant land). However, easements can be terminated in numerous ways, including when the parcels are combined and when they are abandoned. Sue acquired the easement over B 18 years ago. However, 15 years ago, Sue purchased B from Tom. That means that she owned both W and B. Because the lands were owned in one parcel, there cannot be a dominant and a servient land, it was all one. Thus, Sue's express easement was terminated when she bought the property and jointly owned them. (Sue also had no claim to a prescriptive easement, because the easement was granted with permission, and also joint ownership would terminate this kind of easement as well).

2. Dan's Easement

Dan likely had an implied easement over B when he purchased W. For an implied easement, there are four elements: 1) joint ownership of the parcels; 2) during the joint ownership, one part of the land is used to the benefit of another part of the land; 3) the use is visible or apparent; and 4) the easement is reasonably necessary for the use of the dominant land. Here, W and B were jointly owned at one time by Sue. During this time, the facts say Sue used the private gravel road every day for 18 years, satisfying the 2nd element. The use was for a gravel road. A road is visible, and thus Dan would be able to see this. There is nothing in the facts suggesting the road was camouflaged or became overrun by vegetation or hidden in any way. The facts also say Dan was aware of Sue's use of the road. Dan may have trouble showing the final element though. The road through B certainly benefits W, however, Dan must show that it's reasonably necessary. Here, though, this is likely met because the facts say the easement gave Sue "significantly better access" to the highway. More facts would be helpful though to decide this element, like how much time it saved her or how inconvenient it was using the road to the east of W. Nonetheless, the facts suggest that the easement was reasonably necessary, and thus D had a proper implied easement.

There is no argument for an express easement, since the deed from Sue to Dan made no mention of the easement. An easement by estoppel may exist when there is oral (not written) promise of an easement; however, no facts suggest this. The land was not

landlocked (there was a road to the east of W still), so no easement by necessity. And finally, no facts suggest any sort of prescriptive easement use by Dan.

3. Mortgages

Dan took out two mortgages on his property. Dan defaulted and the property was foreclosed on by the bank. The facts say that both the bank and the finance company properly and promptly recorded their mortgages. The bank has a superior mortgage to the finance company because its mortgage was first. Because the house was sold at the foreclosure sale for 1.5 million, the money will go to the bank, because they had the first recorded mortgage on the house and Dan still owed 1.5 million on the bank's mortgage. The finance company will be out of luck from the foreclosure sale; however, they may seek a deficiency judgment in the amount of 400k. Here, they could hold Dan personally liable on the promissory note he signed with the mortgage and come after him for the deficiency (400k). Note, that if the house was sold for more, say two million, there would be a surplus of 100k, which Dan would be entitled to since both the mortgages would've been able to be paid off.

The finance company may argue that the bank's mortgage was more like three separate installment mortgages. Thus, the bank would be first in terms of the first two installments, then the finance company's mortgage would kick in, and the third installment of 700k paid by the bank should be the last mortgage to be satisfied by the foreclosure sale. If a court agreed with this, then the bank would only receive 1.1 million from the foreclosure sale, and the finance company's mortgage of 400k would be fully satisfied. In this situation, the bank would be able to seek a deficiency judgment from Dan for 400k. However, this is a less likely scenario because the facts say the original mortgage by the bank reflected the entire amount of 1.5 million. Thus, when the finance company sought its mortgage on the property for 400k, it should have been on notice that there was already a 1.5 million mortgage, not just a 1.1 million mortgage being paid in installments.

Here, most states give a mortgagor a right to redeem up to the foreclosure sale, meaning if Dan could have come up with the money, he could have repurchased the house. However, no facts suggest he did this. Some states permit the right to redeem even for a short period of time after the foreclosure sale, so depending on what jurisdiction Dan is in, he may have a right to redeem and thus buy back his house if he can come up with the entire amount of money to pay off the mortgagee.

QUESTION #5

Painter is a well-known family portrait artist who paints her portraits from a color picture of the family.

Father had seen other family portraits by Painter. Under state law, all artists and painters are required to obtain an annual vendors license by paying a $500 fee to the State. Painter has never obtained such a license.

On February 1, 2010, Father retained Painter to paint a family portrait as a 50th wedding anniversary present for his wife. Father delivered a color picture of his family to Painter for purposes of the portrait. Father was planning a surprise anniversary party the day of their 50th wedding anniversary (June 1, 2011), and that was the day he planned to unveil the family portrait.

Father and Painter orally agreed that the price for the portrait was $4,000. Painter internally estimated 40 hours of work at $100/hr. to arrive at the $4,000 price. It was agreed that the price was to be paid in 4 equal installments of $1,000 each, beginning on February 1, 2010, and continuing thereafter on June 1, December 1, and the final payment on April 1, 2011. It was further agreed that delivery of the portrait was to be no later than April 1, 2011, but in the event the portrait was delivered sooner, final payment was due upon delivery.

Father made each of the first 3 payments on time by check, and each $1000 check had the notation of "check 1 of 4," check "2 of 4" and "check 3 of 4." Painter was working on the family portrait as payments were being made.

On December 5, 2010, shortly after the third payment, Wife tragically died from a stroke. Two weeks later, Father visited Painter's studio to advise Painter of Wife's death.

During the visit, Painter advised Father that the portrait was coming along, but Painter could not deliver the portrait until April 15, 2011. Painter was obviously behind on her schedule. She had 26 hours into the portrait at this point and was approximately two-thirds finished. Father was unhappy with the delay, and asked to see what progress had been made on the portrait. Upon viewing the portrait, Father was totally disappointed, and told Painter to stop working on it. Father said that he had no intention of paying Painter any more money.

Painter immediately stopped work on the portrait, but did continue to work on her other portraits. For the period January 2011 through April 1, 2011, Painter earned $8,000 in other fees.

Painter wants to sue Father for breach of contract. She seeks your legal advice. Advise her regarding possible grounds, damages and remedies in such a law suit.

MINNESOTA BAR EXAMINATION
FEBRUARY 2012
REPRESENTATIVE GOOD ANSWER
QUESTION 5

The following includes an analysis of Painter (P) potential breach of contract claim against Father.

Applicable law: In all contracts for a sale of goods, the Uniform Commercial Code applies. A good is a movable commodity that can be bought and sold in the stream of commerce. This contract is for a sale of goods because a family portrait is movable and P sells her family portraits individuals in the stream of commerce. F may attempt to argue that this contract is more of a services contract than a contract for the sale of goods because the price was based upon P's hours of work. However, without the resulting portrait, there would be no contract and thus, when the good is the predominate purpose for the contract, the UCC applies.

Contract Formation: The first next issue is whether there is a valid contract between P and F.

A contract is a legally enforceable agreement. In order to have a legally enforceable agreement, there must be mutual assent between the parties in the form of an offer, acceptance, and consideration. An offer is a promise, undertaking or commitment with definite and certain terms communicated to the offeree creating a power of acceptance. An acceptance is an unqualified statement of assent to the power of acceptance created by the offeror. As for consideration, in contracts for the sale of goods, monetary consideration is not necessary – a good faith promise to perform is sufficient.

Here, there is a valid offer because on February 1, 2010, F delivered a color picture of his family to the P for purposes of the portrait. F told P about the 50th anniversary party and that the portrait was going to be for party. Having the portrait and communicating the quantity (in this case, one portrait as a gift) and the purposes for the portrait to P makes the offer valid. There is also a valid acceptance because F and P agreed to the price for the goods and the process of payment. P agreed to paint the portrait in time for the party and F agreed to pay her in four installments, with the final payment due on delivery. In addition, the mutual exchange of promises meets the good faith requirement under the UCC. Therefore, it is clear there is a valid oral contract between P and F.

Statute of Frauds: The next issue is whether this contract is enforceable under the Statute of Frauds.

The Statute of Frauds requires that certain contracts, to be valid and enforceable, must be in writing. In a contract for the sale of goods for over $500 and for a contract that exceeds one year, the contract must be in writing to comply with the Statute of Frauds. However, the statute of frauds can be excused under certain circumstances. When parties enter into an agreement for specially manufactured goods, a court may allow an

oral agreement due to the uniqueness of the good and the fact that it is the result of a specific taste and preference by the purchaser. Usually goods of this kind cannot be resold on the open market and thus, not enforcing such an agreement would cause an extreme injustice to the non-breaching party.

Here, this contract is the sale of good over $500 because the painter is charging $4,000 for the painting. Moreover, this contract will take longer than a year to be performed because the contract commenced on February 1, 2010 and was to end on April 1, 2011. Thus, this contract must be in writing and F will likely attempt to get out of the contract because it is not. This argument will likely not stand because this is a contract for specially manufactured goods and was planned for a very specific purpose: as a gift for F's wife for their 50th wedding anniversary. Such a contract cannot be revoked on the basis of the statute of frauds because it is unique and subject to the strict preference of the purchase. Plus, the portrait alone would be the evidence that F requested it because it would be a picture of his family.

Likewise, in a sale of goods case, when one of the parties is a merchant, the court allows a series of writings to constitute a writing that is sufficient for the statute of frauds. There was a series of writings evidenced in the checks F wrote to P. Each check had a check number 1 of 4, check 2 of 4, and check 3 of 4 written on it. P could argue that these checks paid on the times they orally agreed to indicate that they were payments under a previous agreement because they refer to a 4th payment in the check description. If there was not a contract, there would be no reason to reference that there were to be 4 payments. The court may allow this evidence to come in as the contract.

Therefore, while it is up to the court's discretion, the court will likely still enforce the agreement even though it violates the statute of frauds.

Damages: P will likely be entitled to expectancy damages in the form of lost profits as well as any incidental and consequential damages.

In a breach of contract action, a plaintiff will receive damages if there is a breach by the defendant and they will generally receive what they expected to get out of the bargain. In situations where the buyer breaches and the seller keeps the goods, the buyer will generally get lost profits. Incidental damages are damages that are the direct consequence of the breach and consequential damages are special damages that P may receive.

P will be eligible to get expectancy damages because a contract for specially manufactured goods, the defendant cannot arbitrarily withhold his disapproval.

This will be difficult to argue because P was late with delivery of the portrait by almost a month and thus, once the due date has passed for the contract, a buyer can, but does not have to give the plaintiff a reasonable time to cure. However, again specially manufactured goods, due to their uniqueness and specific taste, a reasonable time to complete and adequately cure a defendant's dissatisfaction (here, F's disappointment with the unfinished portrait) is likely longer than a month. In the present case, with the

50th wedding anniversary no longer taking place because the wife died of a stroke, the court will likely allow more time for P to complete the portrait since the original purpose of the portrait has changed.

Thus, once P finishes the portrait, she will likely get expectancy damages and any loss profits or damages as a consequence to F saying he would no longer perform. However, since she was paid a significant amount in the three installments, her damages would be minimal.

Remedies: P will likely be eligible for a remedy of quasi contract because P detrimentally relied on F's promise to pay her upon completion of the painting.

QUESTION #6

Paul, age eight, and Paul's mother, Mom, spent the morning at Funworld, an amusement park. Paul decided to ride the Ferris wheel. Mom, who was pregnant and tired, waited for him about 100 yards away.

After Paul entered a Ferris wheel car, the attendant, Employee, fastened the car's safety bar. As the Ferris wheel began to turn, Paul could hear loud screams from a car carrying two boys, both age six. The boys were rocking their car vigorously. Employee also heard the two boys screaming and saw them rocking their car, but Employee took no action to stop them.

As Paul's car began to descend from the top of the wheel, the two boys—whose car was right behind Paul's car—shook the safety bar on their car hard enough that it unlatched. Both boys fell to the ground. One of the boys struck Paul on his way down.

After the two boys fell, Employee stopped the Ferris wheel and sounded an emergency alarm to notify Funworld security guards of the incident.

Mom did not see the accident, but she heard the alarm and rushed to the Ferris wheel. A crowd had already gathered, and Mom was unable to see Paul. A bystander told Mom that "a little boy has been killed." Mom, panic-stricken, attempted to make her way through the crowd but could not.

Ten minutes later, the two boys who had fallen were taken to the hospital by an ambulance.

Paul and several of the other passengers begged to be taken off the Ferris wheel. Employee, however, refused without any explanation to restart the Ferris wheel. Thirty minutes later, a manager showed up and ordered Employee to restart the Ferris wheel and allow the passengers to exit.

Forty minutes after the accident, Mom was finally reunited with Paul. Both Paul and Mom went to the hospital, where Paul was treated for minor injuries caused by being hit when the two boys fell and where Mom suffered a miscarriage as a result of accident-related stress.

National accident records show that during the last 40 years, there has been only one other incident in which injuries have occurred as a result of passengers rocking a Ferris wheel car.

Paul and Mom have sued Funworld. Funworld has conceded that Employee was acting within the scope of his employment.

Based on the facts, could a jury properly find that:

1. Funworld falsely imprisoned Paul? Explain.

2. Funworld was negligent because Employee failed to take action to stop the boys from rocking their car? Explain.

3. Mom is entitled to damages for her emotional distress and resulting miscarriage? Explain.

MINNESOTA BAR EXAMINATION
FEBRUARY 2012
REPRESENTATIVE GOOD ANSWER
QUESTION 6

A jury could properly find that Funworld falsely imprisoned Paul. False imprisonment is the intentional physical confinement or restriction of movement so that a victim does not reasonably have an ability to leave without their consent. Here, Funworld, through its employee's action intentionally confined Paul. The employee acted with the purpose or effect of restricting Paul's movement because the employee knew with substantial certainty that Paul would be confined if the car was not lowered to the ground. The employee confined Paul because Paul could not in fact move or leave the car while it was dangling in the air. Funworld could argue that Paul could have left the car by jumping, but a dangerous means of escape is unreasonable, and a victim will not be required to use a dangerous method of escape. Jumping off of a ferris wheel car would have been dangerous for Paul. Finally, Paul did not consent to being imprisoned. Funworld may argue that by getting on the ride voluntarily that Paul consented, but whatever consent he gave was exceeded when the ride stopped. Paul did not consent to being stuck on the ferris wheel for 30 minutes after the ride stopped; he even begged the employee to let him down. The employee had the ability to let Paul off the ride, but refused, and intentionally confined him. Therefore, Funworld falsely imprisoned Paul.

The next issue is whether Funworld was negligent when its employee failed to act. Negligence requires proof of a duty, a breach of that duty, causation, and damages.

Generally, a duty of care is owed to all foreseeable victims of one's tortious activities. A higher duty exists where a defendant holds its property out to the public for business purposes. These victims would be invitees, who are owed the duty to inspect, warn, and protect against possible dangers. Here, Funworld held its park open for business purposes so its visitors were owed a high duty of care. Paul and Mom were visitors of the park, so they were owed a duty of invitees.

One breaches a duty of care when he is not acting as a reasonable prudent person would in that situation. Generally, one does not breach a duty by failing to act. However, where special relationships exist, a failure to act will be considered a breach of duty. Here, the two boys were vigorously rocking the car and screaming. This created a danger to other passengers and bystanders. Failing to act was a breach here because a relationship of inviter and invitee existed with Mom, Paul, and other visitors. The employee breached his duty because a reasonable prudent person would not fail to act where a danger was created by the two boys. At the least, employee should have told the boys to stop vigorously rocking the car, and make them get off of the ride if they refused. This is what a reasonable prudent person would have done. Therefore, Funworld breached its duty of care to Paul and Mom.

Thirdly, causation must be proven, which has two components – actual and proximate. Actual cause is the theory that the breach caused the harm factually, and will be met if the injury would not have happened, but for the breach. Here, but for employee's failure

to act to stop the boys from rocking the car, them falling and subsequently hitting Paul on the way down would not have happened. Therefore, the actual cause component has been met. Proximate cause is the theory that the breach was the legal cause of the injury, and will be met if the injury was a foreseeable result of the breach. This element will be harder to prove because although it was the cause, Funworld can argue that Paul's injuries were too far removed because the foreseeable harm was that of the boys actually falling and not striking another passenger. Additionally, they could argue that it was not foreseeable that any injuries would have resulted because of ferris wheel rocking because it has not happened in 40 years. However, the danger created by allowing vigorous rocking of the car is falling, and when something or someone falls; it is foreseeable that it could hit another person on the way down. Thus, it is probably not too far removed. Therefore, the causation element has been met.

Finally, plaintiffs must show damages. Here, this will be easy for Paul to prove because he sustained minor injuries as a result of the fall, requiring him to go to the hospital. Therefore, he has damages. Because plaintiffs can establish all of the elements to negligence, they can succeed on a claim.

Here, the employee was the actor that actually caused the injury from negligence and the false imprisonment. Funworld can be held liable on the theory of respondeat superior, which allows plaintiffs to bring an action on employer for the actions of its employee if the employee was acting within the scope of his employment. Generally, respondeat superior does not work with intentional torts because an employee would be acting outside the scope of employment, but here, Funworld has already conceded that employee was within the scope, so plaintiffs should be able to bring both the negligence and false imprisonment actions against Funworld.

Mom is not entitled to damages for her emotional distress. Emotional distress is recoverable under an intentional or negligent theory. Here, Mom's reaction to hearing that a little boy had been killed was not caused from anyone's intentional extreme or outrageous conduct, so she will have to rely on a negligence theory.

Negligent infliction of emotional distress requires physical harm resulting from severe emotional distress. Here, Mom had a miscarriage, which is physical harm.

When one brings an action for emotional distress, and they were not hurt by the conduct, they must have been in the zone of danger. For one trying to recover from emotional distress where a family member was hurt or killed, they must actually witness it.

Here, Mom was not in the zone of danger. She was about 100 yards away, and was not in danger of being hit by one of the falling boys. Secondly, the injury to her son did not occur right in front of her; she merely heard that a boy had been killed from a third party bystander. While this did cause emotional stress, since she neither witnessed nor was in the zone of danger, Mom cannot recover for her emotional distress.

QUESTION #7

Ames Senior High School ("AHS") is a public high school with grades 10 through 12 located in Ames City. When students enroll at AHS, they sign a student conduct code promising not to "engage in any activity that disrupts or threatens to disrupt the school operation and/or interferes with the rights of other students to receive an education at school." Among the grounds for suspension from AHS is "[c]ontinued willful disobedience or open and persistent defiance of proper authority, including deliberate refusal to obey a member of the school staff..."

Harriet is a senior at AHS and a passionate critic of United States foreign policy. On the first school day in January, she wore a t-shirt with a picture on the front of the late Osama Bin Laden and the caption "Freedom Fighter." The back of the t-shirt had a picture of the President of the United States and the caption "War Criminal."

While wearing the "Freedom Fighter/War Criminal" t-shirt, Harriet was summoned to the Principal's office. Principal told her to change into another T-shirt, turn it inside out, or face suspension. Principal told her that he was asking her to do this for her own safety. He reminded Harriet that Ames City is home to a number of military families whose children attend AHS and many of those families have members deployed overseas. Their children might take great exception to Harriet's T-shirt, he explained. Further, he claimed that the T-shirt was disruptive. He said his office had already received complaints from students and teachers about it.

Harriet refused, claiming that the t-shirt was protected by the First Amendment. Principal suspended her for three days for her "deliberate refusal" to obey Principal's request. She served her three day suspension, returned to school for the balance of her senior year, and graduated in May.

Harriet and her parents are now threatening to sue, claiming that her suspension violated her rights under both the Due Process Clause and the First Amendment of the U.S. Constitution.

Analyze and discuss the merits of the legal claims threatened by Harriet and Harriet's parents under the U.S. Constitution.

MINNESOTA BAR EXAMINATION
FEBRUARY 2012
REPRESENTATIVE GOOD ANSWER
QUESTION 7

This is a Constitutional Law question.

Harriet and her parents are now threatening to sue Ames Senior High School (AHS), claiming that her suspension violated her rights under both the Due Process Clause and the First Amendment of the Constitution.

First, in order to assert a claim on constitutional grounds, the claim must be timely and the plaintiff(s) must have standing. A claim must be ripe, meaning that there is a threat of harm or imminent harm if the government does not exercise some sort of pre-enforcement. Plaintiffs must also have standing. This requires that the plaintiff claim a constitutional right that is being violated, it is being violated by the government, and the court must redress the issue.

The Due Process Clause offers certain procedural and substantive rights and safeguards to individuals in the United States. Procedural Due Process seeks to enforce that the procedures or mechanisms in place by the government are fair for a plaintiff who believes his or her rights are being violated. Substantive Due Process examines if there is an adequate reason for depriving an individual of those rights. The 14th Amendment of procedural due process applies to the states.

Procedural Due Process examines whether life, liberty, or property has been deprived to the individual and examines the process that adjudicates that. A liberty interest at stake examines whether the individual's freedom based on federal law or the Constitution has been denied in any significant way by the government. A property interest at stake examines whether the individual is legally entitled to a particular property interest (Social Security, for example) under federal law or the Constitution.

The balancing test that the court applies when examining procedural due process is: 1) the interest involved and what affect the loss of such an interest would cause, 2) the value of the procedural safeguard of that interest (whether there's been any error, for example, and 3) the government's interest in efficiency. Often times, procedural due process comes down to notice and an opportunity to be heard in a formal hearing.

Substantive Due Process looks at whether there is an adequate reason for depriving an individual of those rights. Based on that type of right, the court uses three different levels of scrutiny to determine whether such an adequate reason exists. One level of scrutiny is rational basis review where the government action must be rationally related to a legitimate government interest and the burden is on the challenger to prove that it does not. The next higher level of scrutiny is intermediate scrutiny where the government action must be substantially related to an important government interest and the burden is on the government to prove that it does. The highest level of scrutiny, is strict scrutiny where the government action must be important enough to achieve a

compelling government interest and the burden is on the government to prove this. Fundamental constitutional rights are reviewed under strict scrutiny.

As it relates to the case at hand, Harriet and her parents are threatening to sue the school based on a violation of Due Process. Presumably, they will claim that Harriet was deprived a fundamental right (Freedom of Speech) without any due process of law. Here, we do have an instance where a liberty interest (freedom of speech) has been taken by a government actor (the school principal) by threatening suspension if she does not turn the t-shirt inside out. The balancing test applied to Harriet would examine 1) her right to freedom of speech under the First Amendment and what consequence would be brought by losing that freedom in the school setting; 2) the value of the principal making the decision to force Harriet to turn her t-shirt inside out, and 3) the interest in efficiency of that process by the principal at the school.

While it is evident that a government actor is depriving Harriet of her right to free speech, the court, using the balancing test is likely to weigh in on the side of the school on the issue of whether the school provided adequate procedural due process. A school is best equipped to determine the appropriateness of actions of its students and what may cause disruption. Furthermore, all students were on notice that engaging in any activity that disrupts or threatens to disrupt school operation and/or interferes with the rights of other students is adjudicated by the school. It's an efficient process that allows schools to operate without detrimentally violating a student's fundamental rights.

Since the right at issue here is the freedom of speech under the First Amendment, substantive due process requires that this action by the school be determined by strict scrutiny. Again, strict scrutiny evaluates whether government action is necessary to achieve an important government interest. In this situation, avoiding disruption to the school community has been recognized as a legitimate government action restricting the First Amendment in public schools. Thus, Harriet's and her parent's claim of a violation of procedural due process based on the First Amendment would fail.

Furthermore, a claim by Harriet and her parents based solely on a First Amendment violation (which applies to the states through the incorporation doctrine) would also be likely to fail. Freedom of speech may be regulated by time, place, and manner by the government. In this case, the school is regulating the place (the school) of one's speech, but not restricting entirely and certainly not restricting it outside of school. Thus, a claim for violation of First Amendment rights based on freedom of speech is likely to fail based on the time, place, and manner exception to the First Amendment.